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DIVISION II

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STATE OF WASHINGTON  
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No. 40382-0-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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VERONIKA CARDENAS, an individual,

Appellant,

v.

INTEROCEAN AMERICAN SHIPPING CORPORATION, a state of Delaware  
corporation licensed to do business in the state of Washington,

Respondent.

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APPELLANT'S REPLY BRIEF

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**ORIGINAL**

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## I. REPLY FACTS AND ARGUMENT.

IAS inaccurately prefaces its *entire* 26-page Statement of the Case with the claim "The following facts are undisputed." Obviously, Ms. Cardenas contests many of the "facts" asserted by IAS. Additionally, IAS either omits addressing key facts, or fails to put them in proper chronological order; preferring instead to place certain facts where it apparently feels they will be more compelling. For clarity, Ms. Cardenas will address IAS' facts in the order in which they assert them:

**September 4, 2004 LOW:** IAS ignores that Ms. Cardenas provided Capt. Hearn with three timesheets all containing the same mistake, and yet, he only "corrected," without comment, Ms. Cardenas' timesheet. IAS also misrepresents Ms. Cardenas' testimony that she made a "mistake" when not getting clarification from Capt. Hearn regarding why he crossed out her overtime. Ms. Cardenas testified that she did not initially seek clarification because "Captains don't make mistakes," but that when issued the first LOW – even though she felt Capt. Hearn had intentionally misled her (to set her up for discipline) – she tried to accept partial responsibility for the misunderstanding by saying she should have asked for clarification.<sup>1</sup>

In addition, Capt. Hearn testified he characterized Ms. Cardenas as

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<sup>1</sup> CP, at 296 (190:14-21), 300-301 (195:15-196:3).

"defensive" and "argumentative" because instead of just accepting the LOW/discipline, she tried to explain why she had left the ship.<sup>2</sup>

**September 28, 2004 LOW:** In its brief, IAS' ignores both Capt. Hearn's admission that he never discussed Mr. Shibly's complaints with Ms. Cardenas, as well as the resulting reasonable inference that Capt. Hearn did not do so because he understood those complaints to be either insignificant or baseless. Moreover, Ms. Cardenas provides reasonable explanations both for asking Mr. Shibly to not speak Arabic in the galley (he and the Steward Assistant Nasser Ahmed spoke Arabic words to say what appeared to be derogatory names about her), and to not use cleaning sprays until after leftovers were put away.<sup>3</sup>

It is undisputed that Ms. Cardenas is the only person to testify why Mr. Sani left the North Star (overtime dispute).<sup>4</sup> Capt. Hearn claims to not have even asked Mr. Sani *why* he was quitting. Arguably, he either didn't ask, or did but did not want to say the reason because Mr. Sani's leaving had nothing to do with Ms. Cardenas.

Mr. Glenn claims to observe Mr. Sani and Ms. Cardenas in a "heated argument;" but admits he only heard Mr. Sani say "I quit. I can't work this way," and that could not say what Mr. Sani was referring to by "this way,"

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<sup>2</sup> CP, at 868-69 (144:24-148:5).

<sup>3</sup> CP, at 311-12 (215:21-216:7), 993 ¶ 34.

<sup>4</sup> Appellant's Opening Brief, at 11.

or why Mr. Sani left the North Star.<sup>5</sup>

**September 2004 performance review completed by Capt. Hearn:**

IAS points out policy required Capt. Hearn to complete the 2004 performance review of Ms. Cardenas, but ignores that Capt. Hearn did not follow policy by providing Ms. Cardenas with the review.

**Assertions by CE Harry Poole:** CE Poole and Capt. Hearn have known each other for over 20 years.<sup>6</sup> IAS cites to a letter written by Poole in which he claims Ms. Cardenas was "badgering" and "brow beating" her coworkers.<sup>7</sup> Yet, Poole's testimony allows the reasonable inference that he drafted the letter only to support Capt. Hearn's unlawful attempts to get Ms. Cardenas off his ship.

In his letter, CE Poole asserts that Ms. Cardenas had "badgered" two crewmembers, inappropriately brought issues to his attention, and mistreated her galley crew.<sup>8</sup> CE Poole testified he discussed these issues with Capt. Hearn the night he observed Ms. Cardenas "badgering" the crewmembers, and that he wrote his letter the following day.<sup>9</sup>

Yet, CE Poole's letter is dated January 14, 2005. Ms. Cardenas had rotated off the North Star for vacation on December 15, 2004 – a full

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<sup>5</sup> CP, at 472 (80:9-23).

<sup>6</sup> CP, at 788-89.

<sup>7</sup> Brief of Respondent ("Response Brief"), at 11-12.

<sup>8</sup> CP, at 767, 938 (3:14-16), 944 (58:19-59:19).

<sup>9</sup> CP, at 767, 938 (3:14-16), 944 (58:19-60:4), 945 (64:4-65:11).

month earlier – after undisputedly working with Capt. Hearn *without any issues* since December 1, 2004.<sup>10</sup> And, CE Poole's letter is dated only a few days before Capt. Hearn used this letter to support his second attempt to remove Ms. Cardenas from the North Star.<sup>11</sup>

This inconsistency renders reasonable an inference that conduct CE Poole describes in his letter was fabricated in order to support Capt. Hearn's effort to remove Ms. Cardenas, *or*, even if true, that the conduct was of such little significance at the time it occurred that CE Poole did not feel the need to bring it to Capt. Hearn's (or Capt. Daly's) attention. That is, until it could be used by Capt. Hearn.

**January 2005 attempt to remove Ms. Cardenas:** IAS now ignores the false allegation Capt. Hearn made in January 2005: Ms. Cardenas was responsible for five cooks rotating through the North Star galley.

**Capt. Daly:** IAS misrepresents Capt. Daly's testimony that he began counseling Ms. Cardenas “the first day he started working with her;” Capt.

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<sup>10</sup> CP, at 761, 767, 832 (16:15-17:5).

<sup>11</sup> CP, at 761, 767. CE Poole's assertions are also suspect for other reasons: the “badgering” he observed was Ms. Cardenas complaining to a couple of crew members about Capt. Hearn having called an early meal without notifying the galley. When asked how it was different than just typical coworkers complaining about the boss, Poole said “it was different. I can't describe how, it just was.” “Inappropriately” raising issues with him involved Ms. Cardenas asking about a galley repair while he was going through the food line. Poole stated he did not like to discuss work at meals, but admitted it was “just [his] own little thing,” and that Ms. Cardenas stopped doing so. The mistreatment of galley staff involved Ms. Cardenas “talking down” to her staff. When asked which staff he was referring to, Poole named staff who either had not yet worked with Ms. Cardenas, or who joined the ship months after his letter. CP, at 495-96 (37:4-21, 38:13-19), 761-62, 944-946 (58:19-60:13, 62:9-21, 65:17-68:9), 955 (130:1-15).

Daly testimony clearly regarded discussions of the broad scope of issues he and Ms. Cardenas had to coordinate on.<sup>12</sup>

In addition, the testimony that Ms. Cardenas was "shouting" and "screaming" at Steward Assistant Mohammed Hussain incorrectly portrays Ms. Cardenas' demeanor. It is undisputed that Ms. Cardenas used a "raised voice" to ask Mr. Hussain to "calm down," and Mr. Glenn described a "raised voice" as "anything above a conversational tone."<sup>13</sup>

**Mr. Glenn's "complaint" regarding Ms. Cardenas:** Contains the same false claim that 5 cooks left the North Star because of Ms. Cardenas.<sup>14</sup> Additionally, Mr. Glenn's claim that Mr. Ahmed left because of Ms. Cardenas only highlights the double standard that applied to her, and Mr. Glenn's bias. Mr. Glenn – the ship's Chairman – only recalls Mr. Ahmed complaining that Ms. Cardenas required him to handle the night lunches; a complaint Mr. Glenn admitted was not valid, yet he still asserts in his statement that Ms. Cardenas was the problem in that situation.<sup>15</sup>

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<sup>12</sup> CP, at 931 (96:18-97:3)

<sup>13</sup> CP, at 45 (¶ 9), 466 (62:21-24).

<sup>14</sup> IAS now claims only that the number of cooks rotating through the North Star galley was an "unusual event" which caused Capt. Hearn to be "concerned about the high turnover." Response Brief, at 10. Obviously, a very different claim than Capt. Hearn's initial – but now shown to have been knowingly baseless – claim that 5 cooks rotated through the galley *because of* Ms. Cardenas.

<sup>15</sup> CP, at 468-70 (72:8-11, 73:24-74:20), 588, 959 (3:12-14), 962 (50:25-51:18). As such, one may reasonably infer that Mr. Ahmed did not return to the North Star because he did not like Ms. Cardenas asking him to do his job—much like Mr. Hussain when he first started working for Ms. Cardenas.

Mr. Glenn drafted his “complaint” in March 2005, but he did not give it to Capt. Daly—the Captain on board until April 2005.<sup>16</sup> Instead, Mr. Glenn – who also had known Capt. Hearn for 20 years – held onto this “complaint” only to later provide it to Capt. Hearn around the time Ms. Cardenas was terminated.<sup>17</sup>

Finally, although other crewmembers “signed” the complaint, Mr. Glenn testified that they did so only to signify that they had heard the same baseless rumors Mr. Glenn’s complaint contained and furthered.<sup>18</sup>

**Else David:** Ms. Cardenas has never stated or testified that she “confronted” Else David, but rather only that she *asked* whether or not Ms. David had mistakenly opened her email.<sup>19</sup> Moreover, the evidence is such that a trier of fact could reasonably infer that Ms. David was defensive because she had opened the email from her husband to Ms. Cardenas and created a scene to deflect from having done so.

Indeed, even Capt. Hearn testified that the events were “confusing,” and certainly not something that would have caused Ms. Cardenas – even with her claimed problems working with subordinates – to be fired.<sup>20</sup>

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<sup>16</sup> CP, at 588, 758,

<sup>17</sup> CP, at 474 (91:1-18), 812, 959 (3:12-19), 966-67 (111:23-112:2, 114:12-15), 788-89.

<sup>18</sup> CP, at 965 (99:25-100:7).

<sup>19</sup> CP, at 344 (319:5-13). Hardly “bringing a subordinate to task” as IAS asserts. Response Brief, at 18.

<sup>20</sup> CP, at 839 (134:14-23). In fact, given the lack of hesitancy Capt. Hearn had previously shown when issuing LOWs to Ms. Cardenas, it is simply not reasonable to

Despite this, IAS now asserts that this incident made clear to Capt. Hearn that Ms. Cardenas had not improved her relations with her coworkers. It is undisputed that Capt. Hearn had not spoken to Ms. Cardenas about her performance for over a year, and it had been over 7 months since the LOW issued by Capt. Daly.<sup>21</sup>

**October 9, 2005 Letter of Counsel:**<sup>22</sup> Capt. Hearn stated this letter was neither discipline nor intended to raise any new performance issues, but rather, only intended to “clear the air.”<sup>23</sup>

The baseless nature of the claims in this document is exemplified by the claim “Ms. Cardenas inexplicably failed to comply with Chief Engineer Poole’s request to move lettuce...so that it would not spoil.”<sup>24</sup> At his deposition, Poole certainly started to make this claim, but changed his mind when he realized such testimony was inconsistent with his prior testimony that he never spoke directly to Ms. Cardenas about galley matters: “if she asked me directly about it, yes. Oh, I see...that does not back up what I said. No, I don’t...Not with her.”<sup>25</sup>

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believe that had the Else David event occurred in the manner IAS and its witnesses now claim that Ms. Cardenas would not have been issued another LOW, if not terminated.

<sup>21</sup> CP, at 585-86, 835-36 (120:11-122:1).

<sup>22</sup> Ms. Cardenas contested many of the facts IAS now asserts in her Opening Brief.

<sup>23</sup> CP, at 841 (145:3-7), 844 (154:19-155:10). See also, 844 (154:24-155:10).

<sup>24</sup> Response Brief, at 19.

<sup>25</sup> CP, 949 (83:3-84:4). In addition, Poole also testified that he did not bring the lettuce issue to Capt. Hearn’s attention until October 28, 2005, when he gave Capt. Hearn a letter supporting the reasons for Ms. Cardenas’ termination. CP, at 954 (118:17-21).

The “alleged false accusations” referenced in the preamble is based upon Capt. Hearn’s claim that Ms. Cardenas would “blame” other people for the events for which she received LOWs, which according to Capt. Hearn occurred whenever Ms. Cardenas tried to explain her version of the events.<sup>26</sup> Therefore, the October 9<sup>th</sup> document did not address the type of “false allegations” IAS now asserts as a performance issue justifying her termination. Moreover, as to IAS’ new claims, Ms. Cardenas has either denied them (Glenn, David), or provided a reasoned explanation for having made the statement (Shibly).<sup>27</sup>

**Meeting for October 9, 2005 Letter of Counsel:** IAS claims Ms. Cardenas was “defiant,” and “argumentative” during this meeting. Mr. Glenn testified that he viewed Ms. Cardenas as “defiant” because she did sit during their meeting, and the fact that she had not signed some of the LOWs.<sup>28</sup> Capt. Hearn only recalled Ms. Cardenas being “argumentative,” which, consistent with his definition of “blaming others” he defined to mean that she tried to give her side of the story.<sup>29</sup>

IAS misrepresents the record when asserting Ms. Cardenas agreed with its representation of her demeanor during the meeting. Ms. Cardenas

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<sup>26</sup> CP, at 838 (132:7-133:10), 842 (3-18).

<sup>27</sup> CP, at 997 (¶ 45), 1009 (¶ 72), 376 (445:25-449:9).

<sup>28</sup> CP, at 48-81 (125:25-126:5).

<sup>29</sup> CP, at 838 (132:14-18), 841-42 (145:8-146:2).

only agreed that she briefly tried to defend herself, that she started crying, and that because the allegations were not true she did not "agree" to improve.<sup>30</sup>

IAS also fails to address the testimony of Mr. Glenn and CE Poole who described Ms. Cardenas as being "concerned," "upset," and "sad" at this meeting.<sup>31</sup> In fact, Mr. Glenn stated that Ms. Cardenas could not even finish reading the document, and that he took over.<sup>32</sup>

Finally, Capt. Hearn hardly "encouraged" Ms. Cardenas to call Mr. Rogers during this meeting as IAS asserts, rather he arguably *discouraged* her from doing so by telling her "Mr. Rogers is a busy man."<sup>33</sup>

**October 28, 2005 letter of termination:** Capt. Hearn testified that although he had initially written the Letter of Termination as simply "Written Orders" for Ms. Cardenas, he was unsure how the alleged issues would ultimately be addressed because that was still being "developed."<sup>34</sup>

IAS does not address the testimony that both Capt. Hearn and the person who claims to have "discovered" the allegedly improperly frozen

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<sup>30</sup> CP, at 1004 (¶ 58), 347 (331:2-8). In addition, as discussed in Appellant's Opening Brief, there were numerous reasons for Ms. Cardenas to have needed to give her side of the story or defend herself.

<sup>31</sup> CP, at 480, (125:2-13), 947 (74:11-24).

<sup>32</sup> CP, at 481 (126:6-24).

<sup>33</sup> CP, at 788-89. See, email of "gratitude" from Capt. Hearn to Mr. Rogers for essentially "having his back." CP, at 798-99.

<sup>34</sup> CP, at 847 (182:22-183:14).

leftovers, CE Poole, conducted regular inspections of the refrigeration units of the galley where frozen leftovers were routinely stored.<sup>35</sup>

CE Poole established that not only was it a long-standing practice by Ms. Cardenas to freeze leftovers, but that it was typical on a ship for leftovers to not be used within 48 hours. That is, Poole testified that leftovers being served within a “few days” of the original meal is “a normal situation on a ship. That’s what we always see.”<sup>36</sup>

Also, CE Poole could not have discovered the allegedly improperly thawing meat during “a routine inspection.”<sup>37</sup> Poole testified that his hours are 8:00 a.m. to 8:00 p.m., and that once he gets off shift it would not be typical for him to return to work; yet the allegation is that “frozen meats were found overnight in the galley” thawing at room temperature.<sup>38</sup> Had CE Poole been in the galley to view something allegedly occurring “overnight” there would have been nothing “routine” about his presence.<sup>39</sup>

Finally, the letter CE Poole provided Capt. Hearn dated October 28, 2005 in which he describes alleged performance deficiencies by Ms.

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<sup>35</sup> CP, at 878 (183:15-184:22), 942-3 (47:20-48:12, 51:8-11).

<sup>36</sup> CP, at 523 (4-20).

<sup>37</sup> CP, at 605.

<sup>38</sup> CP, at 939 (31:2-32:18), 605.

<sup>39</sup> Indeed, CE Poole started his day after the galley staff, therefore he would not have known when the meat allegedly left out had been taken out or “left to thaw,” even if he observed it first thing in the morning. CP, at 557-58.

Cardenas, is similarly suspect:<sup>40</sup>

- CE Poole testified that at least twice a week he spends 15 minutes inspecting the galley's "chill box" and "freezer box," but that if he found an issue during his inspection – such as improperly stored food – he would not discuss it directly with the Steward: "it's not for me to tell her what to take care of."<sup>41</sup> Yet, this is exactly what Poole claims in his letter to have done.<sup>42</sup>
- CE Poole also testified at his deposition that his attention was drawn to the frozen leftovers because "a couple of guys" had complained about leftovers not "coming back out to meals."<sup>43</sup> His letter, however, references only that he "noticed" the frozen leftovers during a "periodic inspection," not that he was specifically looking for the leftover because he had received complaints from crewmembers.

**Don Anderson and Ms. Cardenas' grievances:**<sup>44</sup> Mr. Anderson falsely claims that Ms. Cardenas did not "raise issues or claims of discrimination or retaliation...or that Captain Hearn (or anyone else) had told her that she was being fired because she had called Interocean management."<sup>45</sup> The record clearly reflects the opposite.<sup>46</sup>

**A. The trial court erred when granting summary judgment on Ms. Cardenas' Sex Discrimination claim.**

- i. Ms. Cardenas produced sufficient evidence to raise an issue of fact on the only element of her prima facie case challenged in the trial court.

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<sup>40</sup> CP, at 607.

<sup>41</sup> CP, at 942-43 (47:20-48:12, 49:12-50:1, 51:8-11).

<sup>42</sup> CP, at 607.

<sup>43</sup> CP, at 521-522 (106:7-107:25)

<sup>44</sup> In hindsight, Ms. Cardenas should have moved to strike this Declaration as irrelevant opinion, and any testimony regarding what he was told would be hearsay.

<sup>45</sup> Response Brief, at 26.

<sup>46</sup> CP, at 973 (250:8-9), 975 (417:1-25).

In its motion for summary judgment, IAS argued that the prima facie case of sex discrimination had these elements: (1) member of a protected class, (2) who suffers adverse action, (3) had been doing satisfactory work, and (4) was replaced by someone not in the protected class.<sup>47</sup> IAS then argued that it was entitled to summary judgment because Ms. Cardenas could not raise an issue of fact on the third element.<sup>48</sup> IAS now contests Ms. Cardenas' ability to meet her burden on both the third and fourth elements.

a. Had been doing satisfactory work:

IAS argues that “the record would not permit a reasonable trier of fact to conclude Cardenas’s performance was satisfactory when her employment was terminated in late October 2005.”<sup>49</sup> To support this argument, IAS asserts that Ms. Cardenas does not dispute that she (1) “verbally abused her subordinate, Else David,” (2) “reacted in a hostile, argumentative, and aggressive manner when Captain Hearn tried to counsel her on [that] and other issues,” and (3) “was responsible for food handling violations which took place under her watch.”<sup>50</sup> Yet, Ms. Cardenas does dispute those claims, and the argument by IAS not only misrepresents her

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<sup>47</sup> CP, at 117.

<sup>48</sup> CP, at 118-120.

<sup>49</sup> Response Brief, at 30.

<sup>50</sup> Id.

testimony, it just ignores the evidence she produced which raises an issue of fact on each of these points.<sup>51</sup>

Indeed, IAS' argument also ignores the testimony establishing that (1) Capt. Hearn admitted confusion regarding the issue involving Ms. David, and that Ms. Cardenas had done nothing to warrant discipline much less termination, (2) Ms. Cardenas was described as "argumentative" because she was trying to give her side of the story when blind-sided by the October 9, 2005 Letter of Counsel, and both John Glenn and CE Poole described Ms. Cardenas as being "concerned," and "sad" at that meeting, and (3) the "food handling" violations were either: a) common practices or longstanding practices on the ship by Ms. Cardenas, and the alleged "violations" had not been a problem until after her call to Mr. Rogers, or b) a "common sense" violation regarding thawing meat that a subordinate allegedly engaged in, and which Ms. Cardenas undisputedly had no knowledge of.

IAS argues that the testimony of Capt. Daly should be disregarded because he was not on board when the above issues arose, and was unaware of "Cardenas's numerous prior performance problems" as Capt. Hearn had not discussed those with him.<sup>52</sup> This argument only serves to

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<sup>51</sup> Appellant's Opening Brief, at 25-26, 29, 36-37.

<sup>52</sup> Response Brief, at 32, fn. 157.

discredit both Capt. Hearn, and IAS' claim that Ms. Cardenas was a highly disruptive and woefully underperforming employee: not only has Capt. Hearn repeatedly claimed he spoke with Capt. Daly about Ms. Cardenas' numerous performance deficiencies, but more importantly, IAS has not resolve the obvious question of how Capt. Daly –who was Ms. Cardenas' boss for over half the time she worked for IAS – could have been so unaware of those "numerous prior performance problems" if they truly existed.<sup>53</sup> IAS simply provides no authority that renders Capt. Daly's testimony inadmissible, and obviously it is evidence that is probative and which a trier of fact could find it quite persuasive on the question of whether Ms. Cardenas would have been terminated absent the discredited and pretextual claims of deficient performance.

Last, Ms. Cardenas does not rely upon only her testimony to raise an issue of fact on this element, but also upon the numerous favorable inferences that flow from the testimony of others she has produced, from the testimony of Capt. Daly, and from the evidence discrediting that which IAS relies upon when asserting that she was underperforming.

Therefore, applying the appropriate summary judgment standard to

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<sup>53</sup> As established in Ms. Cardenas' Opening Brief, Capt. Daly and Capt. Hearn held "turnover meetings" each time they exchanged positions on the ship. Yet, Capt. Daly testified that he and Capt. Hearn discussed Ms. Cardenas on only one occasion early in Ms. Cardenas' tenure on the North Star, and it was limited to Capt. Hearn simply letting him know Ms. Cardenas had been issued a LOW.

the evidence produced by Ms. Cardenas supports a finding that there is issue of fact on this element.

b. Replaced by someone not in the protected class:

On appeal, IAS now not only argues that Ms. Cardenas cannot meet her burden on the fourth element, but also asserts that this Court *must* apply a different fourth element than the one it proposed in the trial court.<sup>54</sup> This Court should decline to address IAS' new and different argument.

On summary judgment, IAS chose both the prima facie test and which elements within that test to challenge. The record developed below was focused on addressing that test and that element, and IAS should not be allowed to alter on appeal Ms. Cardenas' summary judgment burden.

Moreover, IAS' reliance on *Enders/Maden v. Super Fresh*, 594 F.Supp.2d 507 (D. Del. 2009), is misplaced. That opinion neither requires this Court to apply the new element IAS suggests, nor does it hold that *as matter of law*, a hiring restriction precludes a showing on the fourth element.<sup>55</sup>

Yet, should this Court consider IAS' new argument, the record below does create an issue of fact regarding whether the union hiring

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<sup>54</sup> Response Brief, at 32-34.

<sup>55</sup> Response Brief, at 33. In *Enders/Maden* summary judgment was granted because the *pro se* plaintiff did not respond to defendant's motion, and therefore provided no argument regarding how she could raise an issue of fact on the fourth element despite the seniority system. *Id.*, at 513.

system limited IAS' ability to dictate the gender of the person hired, and whether the circumstances of Ms. Cardenas' replacement give rise to an inference of discrimination.

As established in Ms. Cardenas' Opening Brief, the union had previously assigned her to the IAS ship, the Cape Edmont, but shortly thereafter Capt. Hearn simply replaced her with a different steward.<sup>56</sup> In addition, were the hiring system as iron-clad as IAS now asserts, it makes no sense that a captain as seasoned as Capt. Hearn would even try to get a particular steward to replace Ms. Cardenas. Yet, he did try—twice.

Indeed, IAS' reliance on Capt. Hearn's (and, Mr. Rogers') attempts to replace Ms. Cardenas with a woman is a double-edged sword for IAS as such evidence allows for the arguments either that (1) the policy wasn't iron-clad and despite the ability to influence or control hiring, IAS replaced Ms. Cardenas with a man, or (2) the policy is iron-clad and seasoned Capt. Hearn's blustery attempts to replace Ms. Cardenas with another female was simply a ruse to try and weaken Ms. Cardenas' current claim.

Last, the new element suggested by IAS also essentially conflates with the pretext element on which, as discussed, *infra*, Ms. Cardenas has produced sufficient evidence to raise an issue of fact. Therefore, should this Court consider the new argument and element IAS raises on appeal,

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<sup>56</sup> Appellant's Opening Brief, at 4-5.

the record contains sufficient evidence to raise an issue of fact on that element.

2. Evidence of pretext.

IAS argues that Ms. Cardenas has not produced sufficient evidence to meet the “hybrid-pretext” standard set out in *Hill v. BTCI Income Fund-I*, in that her showing of pretext is weak because (1) IAS expressed “serious” concerns about Ms. Cardenas performance, and (2) Capt. Hearn and Mr. Rogers “repeatedly” attempted to replace Ms. Cardenas with female stewards, but the “union unilaterally decided otherwise.”<sup>57</sup> As just discussed, the second claim is suspect. Regarding the first claim, IAS essentially repeats the same deficiencies asserted to support its argument that Ms. Cardenas was not performing satisfactory work. And, as with that prior argument, IAS again fails to address any of the evidence produced by Ms. Cardenas, which must be viewed in the light most favorable to her, and which raises issues of fact regarding whether those deficiencies even occurred or would have motivated her termination.<sup>58</sup>

Instead, it appears that IAS now morphs its argument to claim that even if some of the conduct it asserts Ms. Cardenas engaged in is shown to

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<sup>57</sup> Response Brief, at 37-38.

<sup>58</sup> 144 Wn.2d 172 (2001). Also, Ms. Cardenas does not just “deny the credibility of opposing witnesses,” but points out inconsistencies and falsities that call into question the veracity of each witness. Obviously, whether those inconsistencies are enough to cause the witness to be viewed untruthful is for the trier of fact to determine.

not have occurred, that under the decision in Hill, Ms. Cardenas cannot establish pretext because IAS "perceived" her to have engaged in that conduct.<sup>59</sup> By this argument, it appears that IAS is looking for the safe harbor of "reasonable perception" in the event this Court finds that Ms. Cardenas has discredited some of events upon which Capt. Hearn based her termination. This argument is nothing short of dissembling. Up to now, IAS has never wavered in its assertion that the events for which Ms. Cardenas was terminated not only occurred, but that they occurred in the very manner the IAS claims. Indeed, *ironically*, IAS bases its termination of Ms. Cardenas, in part, upon the allegation that she was "argumentative" and "blaming others" when she tried to explain those events or that they had not occurred as asserted. As noted in *Reeves*, such dissembling can allow for a reasonable inference of discrimination.

IAS also ignores the record to assert Ms. Cardenas "relies entirely on her self-serving declaration" and her own self perception to raise an issue of fact on this element. Ms. Cardenas has provided substantially more than her own declaration and perception to raise an issue of fact

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<sup>59</sup> Response Brief, at 37. So, what was once FACT is now merely "*perception*."

regarding whether the alleged performance deficiencies that resulted in her termination occurred.<sup>60</sup>

Last, IAS misses the point with its argument that “even if Cardenas has successfully called into question *some* of the events leading up to her termination, there remains an ‘abundance of uncontroverted independent evidence that no discrimination occurred.’”<sup>61</sup> Ms. Cardenas has successfully called “into question” the events IAS claims support her termination, by producing evidence sufficient to create issues of fact regarding the veracity and motivation of the witnesses who claim to have witnessed the events, and thus the occurrence of the events themselves.

In sum, when the evidence produced by Ms. Cardenas is considered under the proper summary judgment standard, the record does not support IAS’ argument that her showing of pretext is “weak” *and* that “there is abundant and uncontroverted independent evidence that no discrimination occurred.”<sup>62</sup>

### 3. Evidence implicating Ms. Cardenas’ gender.

IAS asserts there is no indication that Ms. Cardenas’ gender

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<sup>60</sup> Realistically, Ms. Cardenas need only show that the alleged “food handling violations” were pretextual, since it is undisputed that those violations – which IAS calls “the straw that broke the camel’s back” – led to her termination.

<sup>61</sup> Response Brief, at 41.

<sup>62</sup> Hill, at 184-85. The facts of in Hill, are distinguishable from those presented in this matter, as the plaintiff in that case was ultimately unable to produce sufficient evidence to overcome the heightened “same actor” defense. Id., at 189-90.

was a factor in the decision to terminate her. Once again, IAS ignores the record.<sup>63</sup>

It is undisputed that within weeks of starting work with Ms. Cardenas, Capt. Hearn completed a secret performance evaluation, provided only to Mr. Rogers, in which he defined Ms. Cardenas as “high maintenance” and “emotional.” These are patently stereotypical terms which men use to describe problematic and undesirable women. Thereafter, Capt Hearn continued to describe Ms. Cardenas in similar terms throughout the time she worked with him on the North Star.<sup>64</sup> Indeed, shortly before he terminated her, Capt. Hearn testified that he and Ms. Cardenas were having “difficulties and conflict” because she was so “high maintenance.”<sup>65</sup>

Therefore, even if Ms. Cardenas must provide some direct evidence of “gender discrimination,” as opposed to relying on the inference that properly flows from a showing of pretext, Ms. Cardenas has produced such evidence.<sup>66</sup>

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<sup>63</sup> IAS wrongly asserts it is undisputed Mr. Rogers made the decision to terminate Ms. Cardenas. As discussed in Ms. Cardenas’ Opening Brief and further in her below Retaliation argument, *infra*, that issue is contested.

<sup>64</sup> See, e.g., CP, at 769-771 (“emotional,” “difficult,” “delicate,” “emotional person I want off the ship”); CP, at 805 (Ms. Cardenas is “prone to become emotionally upset and impulsive”).

<sup>65</sup> CP, at 837-38 (129:25-130:18).

<sup>66</sup> That Capt. Hearn did not treat all women who worked under him with the same animus does not defeat this showing. Ms. Cardenas should not be required to prove that

**B. The trial court erred when granting summary judgment on Ms. Cardenas' Retaliation claim.**

1. Ms. Cardenas produced sufficient evidence to raise issues of fact on each challenged element of her prima facie case.

IAS asserts that Ms. Cardenas failed to produce sufficient evidence to raise an issue of fact as to whether (1) she engaged in protected conduct during her call to Mr. Rogers, and (2) there is a nexus between that call and her termination. Yet, in its argument, IAS fails to address the bulk of the evidence offered by Ms. Cardenas. And, the argument that IAS does provide is without merit.

- a. Protected conduct.

The argument provided by IAS focuses on a narrow recitation of the contents of Ms. Cardenas' telephone call with Mr. Rogers, and fails to address the full content and context of that call.<sup>67</sup> IAS then goes on to argue, relying on its (own) truncated version of the facts, that such facts are

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Capt. Hearn has animus towards every member of her protected class (see, Callahan v. Walla Walla Housing Authority, 126 Wn. App. 812 (2005)(disability), and Hill v. BCTI Income Fund-I, 144 Wn.2d 172 (2001)(age)), but rather, she need only raise an issues of fact regarding whether *her* gender played a substantial role in her treatment and termination. Additionally, while Ms. Cardenas did consider that Capt. Hearn wanted her off his ship because he did want not a female subordinate with whom he had been unable to maintain proper professional and personal boundaries, the above evidence allows the inference that Capt. Hearn does not like female subordinates whom he views as "high maintenance" and "emotional."

<sup>67</sup> IAS claims that Ms. Cardenas only testified in her Declaration to having told Mr. Rogers that Capt. Hearn treated her "the opposite' of male sailors." Response Brief, at 48. This is an inexplicable argument because Ms. Cardenas provided exactly that testimony at her deposition in response to defense counsel's questioning about her telephone call to Mr. Rogers. CP 975-76 (418:2-419:12).

similar to those of the cases it cites where the appellate courts found the plaintiff had not engaged in protected conduct. IAS' reliance on its own version of the facts, and its argument based thereon, should be rejected.

As discussed in Ms. Cardenas' Opening Brief, the evidence produced in this case establishes that Ms. Cardenas did more than complain to Mr. Rogers that she felt "ignored," "that she didn't deserve the discipline," and "that she didn't feel welcomed." Ms. Cardenas produced evidence of the context of that call, that she believed she had a "right" to call, and did call, the person designated by IAS to handle discrimination and harassment complaints, and that during that call she complained about ill-motivated, unwarranted discipline, and disparate treatment that impacted both her working conditions and ability to do her job.<sup>68</sup> These facts distinguish Ms. Cardenas' conduct from that engaged in by the plaintiffs in the cases cited by IAS: (1) unlike the plaintiff in Colville v. Cobarc

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<sup>68</sup> CP 975-76 (418:2-419:12), 1005 (¶ 60), 1095-98 (355:4-358:20). IAS makes the odd assertion that Ms. Cardenas has "falsely" claimed (1) Mr. Rogers was the contact person only on the discrimination and harassment posting on the North Star, and (2) that such a posting was on the ship when Ms. Cardenas called Mr. Rogers. Response Brief, at 48, fn. 188. Mr. Rogers testified the posting admitted at his deposition— an October 7, 2005 letter informing sailors of a new hotline they could call about possible harassment, discrimination, fraud, illegal or unethical behavior — *supplemented* a prior posting informing sailors to call him with discrimination concerns if the concern was not being handled by the captain. Mr. Rogers stated he could think of no other postings which included his name and contact information. CP, at 794, 891-92 (72:4-75:22). Ms. Cardenas testified that she had obtained Mr. Rogers contact information on "an old letter" that had been posted on the North Star. CP, at 1092-93 (352:8-353:18).

Services, Inc.,<sup>69</sup> Ms. Cardenas complained about conduct that, at a minimum, *arguably* violated RCW 49.60; (2) unlike the plaintiff in Vasquez v. State,<sup>70</sup> Ms. Cardenas made clear that she was calling Mr. Rogers to opposed that conduct; and (3) unlike the plaintiff in Graves v. Department of Game,<sup>71</sup> Ms. Cardenas did more than just complain to a business mentor and associate about her working conditions—she called a stranger who had been specifically designated by IAS to handle discrimination and harassment complaints, and complained to that person of ill-motivated and disparate treatment that at a minimum arguably violated RCW 49.60.<sup>72</sup>

Ms. Cardenas admits to not specifically stating that she felt “discriminated,” “harassed,” or “targeted.” Yet, IAS fails to cite any case that requires a retaliation plaintiff to use such words or any similar word before the protections of the statute attach. In fact, such a requirement would ignore that the reality that an employee is often a layperson who may not be very articulate when lodging complaints about their treatment.

Besides, the totality of the facts argued to this Court would allow the trier of fact to reasonably infer that regardless of the words used by Ms.

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<sup>69</sup> 73 Wn App. 433 (1994).

<sup>70</sup> 94 Wn. App. 976 (1999).

<sup>71</sup> 76 Wn. App. 705 (1994).

<sup>72</sup> See, e.g., Broyles v. Thurston County, 147 Wn. App. 409, 431, 437, 195 P.2d 985 (2008).

Cardenas, both Mr. Rogers and Capt. Hearn understood Ms. Cardenas was going, and did, complain to Mr. Rogers about unlawful treatment: in the days leading up to Ms. Cardenas' call to Mr. Rogers, Capt. Hearn was concerned that Ms. Cardenas was "preparing to charge [him] with harassment," and in an email to Mr. Rogers right after that call, Capt. Hearn indicates his belief that she had done so: "[Ms. Cardenas] would not have written a kind note to me if she thought that you, at IAS, would take her side and reprimand me in some manner."<sup>73</sup>

Thus, neither the cases cited by IAS, nor its arguments in reliance thereon, support a finding that Ms. Cardenas failed to produce sufficient evidence to raise an issue of fact on the element of protected conduct.

b. Nexus.

IAS first asserts that Ms. Cardenas has provided an improper test for this element. This is not accurate. The case cited by Ms. Cardenas, Wilmot v. Kaiser Aluminum & Chem. Corp., as well a number of cases which cite to it, reveals Ms. Cardenas' citation to that case is appropriate. Thus, Ms. Cardenas properly asserted that a retaliation plaintiff establishes a nexus by a showing that "the employee participated in an opposition

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<sup>73</sup> CP, at 798-99, 837-38 (129:25-130:18). Capt. Hearn's concern coincides with Ms. Cardenas' testimony that around this same time she was having difficulty doing her job because Capt. Hearn had now stopped even the minimal communications they previously exchanged related to her work. CP, 1005 (25:23-24).

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activity, the employer knew of the opposition activity, and the employee was discharged.”<sup>74</sup> Only after first setting out this test, did Ms. Cardenas then argue that she produced sufficient evidence to meet it.<sup>75</sup>

Furthermore, IAS also overlooks well established case law when arguing that Ms. Cardenas may not support her pretext claim by citing to the proximity of her termination to her complaints to Capt. Hearn and Mr. Rogers.<sup>76</sup> The language from Anica v. Wal-Mart Stores, Inc., which IAS relies upon for this proposition, is stated in the context of plaintiff’s disability discrimination claim, not a retaliation claim as in this case.<sup>77</sup>

Admittedly, Ms. Cardenas did not specifically argue in the trial court that Capt. Hearn told her that he had to fire her because she had “called the company.” Yet, Ms. Cardenas averred to the comment in her Declaration, and contrary to IAS’ assertion, the record establishes that both Ms. Cardenas and Capt. Hearn provided testimony regarding the comment.<sup>78</sup> As such, there is no further record to develop, and IAS is not prejudiced by Ms. Cardenas articulating this additional evidence.

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<sup>74</sup> Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991).  
Kahn v. Salerno, 90 Wn. App. 110, 951 P.2d 321 (1998).

<sup>75</sup> Appellant’s Opening Brief, at 53-54.

<sup>76</sup> See, Estevez v. Faculty Club of the Univ. of Wash., 129 Wn. App. 774, 799, (2005).

<sup>77</sup> 120 Wn. App. 481, 488-89, 84 P.3d 1231 (2004). When addressing the plaintiff’s retaliation claim, the court recognized the probative value of timing. Anica, at 491.

<sup>78</sup> CP, at 1008 (¶ 68), 975 (417:1-23), 237 (252:3-18). IAS also wrongly asserts Ms. Cardenas did not raise this comment with her union; she did. CP, at 975 (417:1-23).

In addition, the absence of discussion of a retaliatory motive in the emails between Capt. Hearn and Mr. Rogers is of no moment, as courts roundly recognize that such evidence is rarely made or produced.<sup>79</sup>

Moreover, this argument overlooks the undisputed facts that (1) IAS has withheld certain communications between Mr. Rogers and Capt. Hearn, alleging claims of “work-product” and “attorney-client privilege,” and (2) Mr. Rogers testified to not making notes in order specifically to avoid creating a document that he could later be deposed on.

Finally, Ms. Cardenas did produce evidence that raises an issue of fact regarding who made the decision to terminate her, facts which IAS has neither attempted to explain nor controvert. In any event, even if the decision was made by Mr. Rogers, IAS does not establish how that would preclude Ms. Cardenas from meeting her burden on summary judgment. More importantly, Mr. Rogers testified that his viewpoint of Ms. Cardenas as an employee was formed entirely by what Capt. Hearn told him.<sup>80</sup> Therefore, even if Mr. Rogers made the termination decision as opposed to Capt. Hearn, or a joint decision, he was merely the “cat’s paw.”<sup>81</sup>

In sum, Ms. Cardenas has produced sufficient evidence to create an

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<sup>79</sup> Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 621 (2002).

<sup>80</sup> CP, at 909 (161:20-25).

<sup>81</sup> See, e.g., Arendale v. City of Memphis, 519 F.3d 587, 605 n.13 (6th Cir. 2008); Poland v. Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004).

issue of fact on the nexus test: she engaged in protected conduct, IAS was aware of that conduct, and she was terminated.

2. Evidence of pretext:

It is undisputed that the alleged galley issues led to Ms. Cardenas' termination. In other words, prior to the "discovery" of those issues, Capt. Hearn (and IAS) did not feel Ms. Cardenas had engaged in conduct that warranted her termination. And IAS has not even attempted to refute the evidence central to Ms. Cardenas' pretext argument:

- all three issues set out in both the "orders" document and the Letter of Termination were "discovered" by CE Poole;
- all three were "discovered" after Ms. Cardenas' call to Mr. Rogers;
- 2 of the 3 alleged violations involved common practice in general, or long-standing practices by Ms. Cardenas which she had not previously been informed were a problem;
- Both Capt. Hearn and CE Poole conducted regular inspections of the galley areas where frozen leftovers were routinely stored, but never claimed an issues until Ms. Cardenas called Mr. Rogers;
- Capt. Daly conducted similar daily inspections, at differing times, and never noticed any issue;
- the remaining violation, which IAS now says is only a violation of "common sense," involved the alleged conduct of a subordinate of which Ms. Cardenas was unaware until she was fired;<sup>82</sup>
- Capt. Hearn did not take any action when told of the improperly thawing meat, as the common sense violation allegedly continued to happen;<sup>83</sup>

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<sup>82</sup> Response Brief, at 38. Such subjective measurements of performance "should be closely scrutinized for potential discriminatory application because of the "potential for manipulation inherent in the use of subjective evaluations" and that "subjective practices are particularly susceptible to discriminatory abuse." See, Warren v. City of Carlsbad, 58 F.3d 439 (9<sup>th</sup> Cir. 1995); Jauregui v. City of Glendale, 852 F.2d 1128 (9<sup>th</sup> Cir. 1988).

<sup>83</sup> CE Poole claims to have observed meat thawing overnight on three occasions over the course of a week. CP, at 607. He claims that each time he reported his observations to

- Capt. Hearn did not discuss any of the alleged critical health concerns with Ms. Cardenas, or bring his concerns to her attention, until the day he fired her.

The evidence provided by Ms. Cardenas in her briefs to this Court, when viewed in the appropriate light establishes issues of fact regarding whether the alleged “food handling” and “common sense” violations were a pretext for retaliation. That is, Ms. Cardenas has produced sufficient evidence to raise issues of fact regarding whether those violations were “discovered” or asserted simply to provide justification for her termination.

Based on the foregoing arguments, Ms. Cardenas produced sufficient evidence to meet her summary judgment burden on her retaliation claim, and therefore summary judgment was not appropriate.

**C. The trial court abused its discretion when denying Ms. Cardenas' motion to strike.**

a. Ms. Cardenas did not waive the ability to object.

IAS asserts that Ms. Cardenas waived her ability to challenge the admissibility of the Declaration of Elish Higgins and its exhibits by “affirmatively raising her disciplinary and performance history beyond Interocean, and her employment experience at Seabulk.” This argument was not raised in the trial court. In any event, it is meritless.

To support its waiver argument, IAS cites only to the holding

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Capt. Hearn, but never bothered to ask Capt. Hearn “have you talked with Veronika, yet?” CP, at 938 (3:22-23), 952 (102:8-103:3, 105:12-15).

in Sevener v. Northwest Tractor & Equipment Corp.<sup>84</sup> Yet, that case is inapplicable in this matter because, unlike the defendant in Sevener, Ms. Cardenas did not use the Higgins Declaration or any of its exhibits for her own purpose. To the contrary, Ms. Cardenas argued against the veracity of the Higgins Declaration and its exhibits, and introduced evidence of her work performance on Captain Higgins' ship only to rebut and defend herself against the allegations contained in that Declaration and exhibits. As such, Ms. Cardenas did not waive her ability to contest the admissibility of the highly prejudicial Higgins Declaration and its exhibits.<sup>85</sup>

b. The trial court abused its discretion.

IAS now claims to offer the Higgins Declaration and its exhibits into evidence to rebut Ms. Cardenas' "conspiracy theory."<sup>86</sup> This was not argued in the trial court. Moreover, IAS' argument is once again based upon the assumption that the contents of the Higgins Declaration and its exhibits are true; something Ms. Cardenas contests. To allow such evidence would require the trial court to conduct a "trial

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<sup>84</sup> 41 Wn.2d 1, 247 P.2d 237 (1952).

<sup>85</sup> See, Taylor v. Cessna Aircraft Co. Inc., 39 Wn. App. 828, 831-32, 696 P.2d 28 (1985); Storey v. Storey, 21 Wn. App. 370, 375-76, 585 P.2d 183 (1978). IAS also intimates Ms. Cardenas "opened the door," but provides no authority or argument to support its position. Moreover, Ms. Cardenas' evidence was limited to describing her reputation at the time she joined the North Star in 2004. Such testimony does not open the door to the Higgins Declaration or its exhibits.

<sup>86</sup> Response Brief, at 57.

within a trial" on a disputed matter so far removed from the events at issue in this case that, even if of some marginal relevance, the probative value would be far outweighed by the potential prejudice.

Under such circumstances, the trial court abused its discretion when denying Ms. Cardenas' motion to strike.

c. The trial court's error was not harmless.

IAS claims any error by the trial court was harmless because the Higgins Declaration and the exhibits are essentially cumulative.<sup>87</sup> This is simply not accurate.

Evidence is cumulative if, in substance it is the same as other evidence that is admitted.<sup>88</sup> In this case, there is simply nothing cumulative about the highly prejudicial Higgins Declaration or its exhibits, and IAS' argument must be rejected.

## II. CONCLUSION.

Based upon the foregoing, the trial court must be reversed.

Dated this 22<sup>nd</sup> day of September, 2010.

  
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Attorneys for Plaintiff

<sup>87</sup> IAS also claims the "Higgins materials" show that Ms. Cardenas' "problems continued long after she left the North Star," yet it fails entirely to address either the 3 years of employment between the two employers, and that Captain Higgins and Seabulk clearly had an ax to grind regarding Ms. Cardenas.

<sup>88</sup> Kimball v. Otis Elevator Co., 89 Wn. App. 169, 947 P.2d 1275 (1997).